No. 94-872 (3)

Supreme Court, U.S.
FILED
DEC 13 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY,

Petitioners,

—v.—

JOSEPH SAN FILIPPO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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33 pp

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are parties before this Court and the names of all parties appear in the caption of this case.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	v
RESPONDENT'S BRIEF IN OPPOSITION ...	1
STATEMENT OF THE CASE	2
COUNTERSTATEMENT OF FACTS	2
PROCEEDINGS BELOW	8
THE DECISION SOUGHT TO BE REVIEWED	12
REASONS FOR DENYING THE WRIT	16
THE DECISION BELOW RAISES NO SPECIAL OR IMPORTANT ISSUE NOT PREVIOUSLY SETTLED BY THIS COURT.....	16
I. The Third Circuit decision sought to be reviewed is totally consistent with this court's prior decisions and does not present any novel issue requiring review.....	16

II. The decision below imposing possible liability upon the state university is not inconsistent with this court's decisions in Monell v. Department of Social Services, 436 U.S. 658 (1978) and St. Louis v. Praprotnik, 485 U.S. 112 (1988) or Canton v. Harris, 489 U.S. 378 (1989). In any event, review of the Monell issue is premature, since Respondent presented sufficient evidence to show that the Board of Governors was aware of the retaliatory action complained of and therefore summary judgment was properly denied 21

III. The Decision Below was not inconsistent with this Court's decision in Mt. Healthy 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

	Page
Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983)	20
Bisbee v. Bey, 1994 WL 598855 *3 (10th Cir. Nov. 3, 1994)	25
Brookins v. O'Bannon, 699 F.2d 648 (3d Cir. 1983)	20
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	20
Canton v. Harris, 489 U.S. 378 (1989)	25
Connick v. Myers, 461 U.S. 138 (1983)	25
Connor v. Reinhard, 847 F.2d 384 (7th Cir. 1988)	25
DeCintio v. Westchester County Med. Center, 821 F.2d 111 (2d Cir. 1987)	19
Dillon v. Coles, 746 F.2d 998 (3d Cir. 1984)	19
Durant v. Independent Sch. District No. 16, 990 F.2d 560 (10th Cir. 1993)	25
Duvall v. Sharp, 905 F.2d 1188 (8th Cir. 1990)	21
Franco v. Kelly, 854 F.2d 584 (2d Cir. 1988)	21
Goff v. Burton, 7 F.3d 734, 736 (8th Cir. 1993)	20

Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986) 21

Hall v. Marion School Dist. No. 2, 31 F.3d 183, 196 (4th Cir. 1994) 25

Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986). 21

Holley v. Seminole County School District, 755 F.2d 1492 (11th Cir. 1985) 18

Johnston v. Harris County Flood Control District, 869 F.2d 1565 (5th Cir. 1989) 25

Kovats v. Rutgers, the State University, 822 F.2d 1304 (3d Cir. 1987) 3

McDonald v. Smith, 472 U.S. 479 (1985) . . . 25

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18

McDonough v. Trustees of University System of N.H., 704 F.2d 780 (1st Cir. 1983) 25

Monell v. Department of Social Services, 436 U.S. 658 (1978) 17,25

Mt. Healthy City School District Board of Education v. Doyle, ... 17

Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982) .25

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 25

Ratjen v. Litchfield, 878 F.2d 837 (5th Cir. 1989) 25

Serrano's Gasco, Inc v. Morgan, 874 F.2d 1310 (9th Cir. 1989) 21

Smith v. Maschner, 899 F.2d 940 (10th Cir. 1990) 21

Sprouse v. Babcock, 870 F.2d 450 (8th Cir. 1989) 21

St. Louis v. Praprotnik, 485 U.S. 112 (1988) . .17, 25

Taitt v. Chemical Bank, 849 F.2d 775 (2d Cir. 1988) 19

Ware v. Unified School District No. 492, 902 F.2d 815 (10th Cir. 1990). 25

Waters v. Churchill, 114 S. Ct. 1878 (1994) . .25

White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (2d Cir. 1993) 25

Wright v. Newsome, 795 F.2d 964 (11th Cir. 1986) 21

Yatvin v. Madison Metropolitan School District, 840 F.2d 412 (7th Cir. 1987) 25

STATUTES

42 U.S.C. §1983 10

No. 94-872

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MICHAEL BONGIAVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY

Petitioners

-against-

JOSEPH SAN FILIPPO, JR.

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari filed in this matter. The petition raises no special or important issue not previously settled by this Court. In addition, as to two of the questions presented, there is no conflict with any other Circuit or with prior decisions of this Court. Furthermore, this case presents a unique factual pattern in which the Court of Appeals held that summary judgment should not have been granted on the basis of the record below, in light of the many factual issues in dispute and in light of the failure to afford discovery to Respondent. Even if this Court

granted certiorari and reversed the decision of the Third Circuit on the grounds raised in the Petition, the decision below must be still be affirmed and the case remanded for trial, since many issues still remain in the case. The posture of the case is such that review at this time is premature.

STATEMENT OF THE CASE

A. Counterstatement of Facts

Respondent's Record at Rutgers: Respondent was a tenured Professor of Chemistry at Rutgers, the State University, with a distinguished teaching and research record over a seventeen year period.[1] The Senate Panel that recommended his dismissal commented: "Professor San Filippo has an excellent record, as evidenced by his long list of publications and promotion to the rank of professor in 1984...He is an active research[er] with an international reputation...His research accomplishments are an asset to the University's quest for excellence and distinction. There is no doubt that Professor San Filippo has made positive contributions to the University." (A118)[2]

Another manner in which Dr. San Filippo distinguished himself at Rutgers was his repeated objections to what he considered dangerous, improper or even illegal activities at the school. As the District Court below noted in its initial decision in this matter:

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[1] As noted in its title, Rutgers is the State University of New Jersey, and is a "state actor" for purposes of applying the due process clause of the 14th Amendment. However, it does not enjoy 11th Amendment immunity because of its independent financial position in the State, see Kovats v. Rutgers, the State University, 822 F.2d 1304 (3d Cir. 1987).

[2] Respondent adopts the Petitioners' record notation system, referring to the Appendix to the Petition as "App." The Appendix in the Third Circuit will be referred to as "A."

> Professor San Filippo had to have been a thorn in Rutgers side, continually voicing complaints and filing grievances and arbitrations concerning a variety of matters and filing at least three legal actions against the University aside from this action, conduct which played no explicit part in Rutgers decision to terminate him. (743 F. Supp. at 328)(emphasis added).

The complaint describes at least nine constitutionally protected activities taken by Dr. San Filippo which he alleges were the basis for retaliatory action by the University. (A33 et seq; App. 6-10; 72). Some of his complaints focused on illegal funding decisions made by his department (including improper deductions from his federal grants), the manufacture of illegal drugs at the laboratories and safety conditions affecting students. (App. 22; A83-84). He also brought three lawsuits and two grievances against the University, one leading to a formal arbitration proceeding and the other to a law suit brought on Respondent's behalf by the Rutgers chapter of the AAUP. (App. 6-10, 72).

There is no question but that Respondent's actions created antagonistic feelings among members of his department and among school administrators. The Department admonished him for "washing [its] dirty linen in public." (App. 7). Dean Tilden Edelstein, one of the administrators who later initiated the charges against Respondent, later stated to a newspaper reporter: "If he had behaved better earlier in terms of his relations with his colleagues," he might have been treated differently. But he persisted in being "Joe the Warrior." (App. 20; A606)[3]

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[3] In addition, the Arbitrator who heard one of the grievances against Respondent, commented on the conspicuous and obvious hostility manifested against Respondent by senior members of his department, including the chairman. (App. 12-13).

The Charges: In late 1985, certain charges were brought against Respondent focusing on his alleged treatment of certain Chinese contract employees at his laboratory (not students but co-employees of the University). Petitioners' discussion of the manner in which the charges arose misstates certain key facts.

Petitioners claim that the allegations of Respondent's alleged mistreatment of several foreign nationals, in particular, Messrs. Xiao and Mr. Gao and Ms. Zang, were spontaneous and prompted by a janitor's report. In fact, the complaints filed by Messrs. Xiao and Gao and Ms. Yaru Zang, as well as that later made by Ms. Chen, were solicited over the course of several secret meetings arranged by Respondent's chairman, Dr. Boikess or acting-Chairman, Dr. Potenza, (A813) both of whom were cited by an impartial arbitrator as individuals who harbored strong animus toward Respondent and whose testimony lacked credibility. (App. 8-9; A805-08, 1151-56, 1163).

Concerning Ms. Zang's allegations, Petitioners neglect to tell this Court that these charges were dismissed in their entirety by the faculty Senate Panel. (App. 157; A86). At the same time Petitioners also ignore the fact that the University's principal complainant, Mr. Xiao, approached Dean Tilden Edelstein in an attempt to withdraw the complaints, but that Dean Edelstein imposed such humiliating requirements on Mr. Xiao before he would consent to permit him to withdraw the charges that Mr. Xiao abandoned his attempt. (A817-18, 1618-34). [4]

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[4] The record also reveals that Dean Edelstein went out of his way to prejudge the issue even before Respondent was informed of the charges. The Dean wrote a letter to the complainants -- in which he "... expressed] [his] appreciation for [their] cooperation in [the University's] investigation of matters related to the professional conduct of Prof. Joseph San Filippo....I am authorized to expressed the appreciation of the Central Administration of Rutgers University for the courage and honesty you have displayed...Your actions are a credit to your country and to the integrity of the chemistry field." (A814-15, 1200). When

With respect to the charge that Respondent had filed a "false time report," the University waited seventeen months before deciding that any wrong had been committed. As disclosed in the sworn testimony of Jack Gordon, the University administrator who specially authorized Respondent's actions which led to his being charged with wrong-doing (A1740), the events occurred in August, 1984 (while Dr. San Filippo was out of the country on a lecture tour). On his return in November, 1984, Respondent openly told school officials what had occurred. Petitioners wrongly state that the University only learned of this fact after the complaint made by the visiting Chinese scholars (Pet. at 6). In fact, the record clearly reveals that the University sent two letters (one dated December 20, 1984, and the other dated January 9, 1985) accusing Dr. San Filippo of "deliberate[ ] falsification" in filing the time reports (A1187, 1189-90). However, no formal charges of any kind relating to this matter were filed against plaintiff until August, 1986 (A811). In addition, if there was any impropriety involved, why did the University subsequently offer a permanent position to the technician who signed and submitted the allegedly falsified time report while Dr. San Filippo was out of the country? (A811). [5]

Petitioners refer to the alleged impropriety regarding the authenticity of a letter of recommendation submitted by Dr. San Filippo on behalf of Mr. Peng Zhou, a visiting scholar in respondent's laboratory. The alleged impropriety arose when an Executive Officer in the Chemistry

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asked during his deposition why he had written such a letter, Dean Edelstein stated, "...the purpose of this letter was to beef up their [complainants'] backbone." (A815).

[5] As a University-approved contract employee from 1981 through mid-1984, the technician involved, Ms. Brownawell, was routinely compensated for her overtime with compensatory time which she generally took as a paid vacation in August. No one ever stated any disapproval with this practice. Indeed, compensatory time is widely, regularly and routinely used throughout the University.

Department, Dr. Martha Cotter said she became concerned about a letter of recommendation bearing the name of Professor Liu Guozhi which had been submitted in support of Mr. Peng Zhou's application for admission to the graduate program in chemistry. Prof. Liu had given this letter, hand-written in Chinese, to Dr. San Filippo while Respondent was lecturing in China and asked him to hand-deliver it to Mr. Zhou. Respondent obliged. Prof. Liu asked Mr. Zhou to translate his letter into English and submit it with, and in support of, Mr. Zhou's application. Mr. Zhou complied and Dr. San Filippo, as a courtesy, smoothed the English before having it typed. (A843). However, there never was any question that the content of the letter correctly reflected Prof. Liu's recommendation.

Petitioners also misrepresent the circumstances surrounding respondent's alleged misconduct in assigning Mr. Zhou the employment title "Postdoctoral Fellow". As the record clearly shows, Respondent not only was following an established practice within the chemistry department (A1794), but acted with the expressed approval of the dean's office, as disclosed in the sworn testimony of the University's own witness. (A841-43, 1804-08).

Petitioners have also omitted significant facts from their assertion that Respondent was guilty of "insubordination." The December 16, 1985, prohibition which petitioners cite as the basis for this charge, was contravened on numerous occasions by both its author, Chairman Boikess, and acting-Chairman, Dr. Potenza. (A845-47). Moreover, respondent testified that he acted on the contention -- upheld by the faculty Senate Panel which disregarded this charge in its findings (A116) -- that the original prohibition (A845-47) were a violation of his due process rights. (A1843).

The Conduct of the Hearing: Formal charges were filed against Respondent in August, 1986. Hearings to consider the charges were initiated before a Senate Panel of five faculty members chosen by lot, none of whom had any legal training. The hearings began in March, 1987 and continued through September, 1987. The University was

given every opportunity to present its entire case, often introducing extensive hearsay testimony over objection. (A849). The Panel, after receiving an ex parte communication from University Vice President Susan A. Cole granting them summer salary benefits and encouraging them to abbreviate the hearings, ordered an absolute time limit for the remainder of the proceedings and divided the remaining time equally between the two sides, which it measured with a chess clock. (A849)

Another problem arose with respect to compensation to be paid to the members of the Panel, as a result of the unexpected length of the proceedings. In view of the heavy demand on their time, the members of the Panel sought additional compensation from the Rutgers Administration, represented by the Vice President for Personnel, Susan A. Cole, the chief "prosecutor" of the charges against Dr. San Filippo.[6] It appears that the chairman of the panel, Professor Ted Szatrowski, had been secretly discussing additional compensation for the panel members with Vice President Cole continuously throughout the course of the hearings. (A1959). When Professor Szatrowski complained (again during ex parte discussions) that the Panel had to continue its work into the fall months and therefore deserved still further compensation, Dr. Cole responded that she would not consider the request for further compensation until after the hearings ended, but suggested that she would reconsider the matter at that point (A858, 1959).

In fact, after the hearings were completed and the Panel issued its decision in favor of the administration finding Dr. San Filippo guilty of dismissible offenses, its members received generous salary increases. This occurred

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[6] Vice-President Cole had a significant role in the drafting, investigation and recommending of the charges against plaintiff. (A819-20). In addition, Dr. Cole was introduced at the hearings as the official representative of the President and the highest official of the Administration that was prosecuting the charges. (A1898).

in February, 1988, through the efforts of Dr. Cole. (A1206, 1863-65, 1883-91). Except for a brief exchange about the possibility of summer salary payments, all of these discussions about additional salary occurred off the record without any notification to Respondent or his representatives. (A1972-74).

On May 13, 1988, the Board of Governors upheld the findings of the Senate Panel and ordered Dr. San Filippo dismissed. (App 95-148)

There was one dissent, by member Walter Wechsler, who stated that "the punishment is clearly out of proportion to his alleged wrongdoing, and quite possibly tainted by a long history of animus." (App. 145) He noted the lack of precedent for the punishment: "It is difficult to imagine that, among the thousands employed by the University, only Professor San Filippo had committed offenses of this nature." (App. 145). He concluded:

> The sanction imposed on Professor San Filippo could be the death knell of his career in higher education. Before sustaining that sanction, we must insure that it was chosen as the result of objective and careful deliberations and is proportionate to the offense." (App. 148)

B. Proceedings Below

Two months after the decision dismissing Dr. San Filippo, this action commenced. The complaint filed by Respondent under 42 U.S.C. §1983 contained four constitutional claims: (1) the regulations under which he was dismissed were void for vagueness; (2) the proceedings brought against Dr. San Filippo were initiated in retaliation for his exercise of First Amendment rights; (3) Respondent was deprived of equal protection through the selective enforcement of the disciplinary proceedings because of his exercise of First Amendment rights; (4) Respondent's procedural due process rights were violated because of the financial interest of the members of the Senate Panel who

conducted the proceedings. He also added a claim under the New Jersey constitution and a pendent common law claim for breach of contract. (A8).

While the parties were engaged in extensive discovery, but while many outstanding requests for information and documents made by Dr. San Filippo remained unsatisfied, Rutgers moved for summary judgment on all the claims. Respondent opposed that motion with extensive factual submissions. After reply papers were filed, Respondent cross-moved for summary judgment and to amend the complaint. The district court allowed the amendment and a Third-Amended Complaint was filed (A33).

After argument on the pending motions, the District Court issued its initial decision denying the University's motions and granting Respondent's motion for partial summary judgment on the vagueness cause of action, 743 F. Supp. 327 (D.N.J. 1990). The District Court held that the words of the regulation did not give fair warning that they covered ethical violations. The court noted that the term "ethics" is not referred to in the dismissal regulations and the word "dismiss" or "dismissal" does not appear in the ethics regulations. Ethical considerations were at the heart of the entire effort to dismiss Dr. San Filippo, the Court held.

On interlocutory appeal, the Third Circuit reversed the decision of the District Court, dismissed the vagueness claim, and remanded the case for further proceedings, 961 F.2d 1125, 1137 (3d Cir. 1992). This Court denied a writ of certiorari, 113 S. Ct. 305 (1992).

The University then renewed the pending motions for summary judgment on the other claims in the complaint -- First Amendment retaliation/equal protection, procedural due process and three state law claims. The district court referred the matter to Magistrate Judge Stanley R. Chesler for a Report and Recommendation. Oral argument was held before the Magistrate Judge on February 2, 1993 (A2017 et seq.). On May 25, 1993, the Magistrate Judge issued a

Report and Recommendation dismissing the state law claims, dismissing the procedural due process claim, but denying Rutgers' motion for summary judgment on the First Amendment retaliation/equal protection claim. (A2121-65)

On the First Amendment retaliation claim, the Magistrate Judge noted that Dr. San Filippo had engaged in protected First Amendment activities, including his various complaints about safety conditions in the chemistry department, the investigation into the manufacture of illegal drugs and the improper diversion of funds from his federal grants, all of which were matters of "public concern." (A2139). The Magistrate Judge also held that the law suits, grievances and arbitrations filed by Dr. San Filippo were protected by the petition clause of the First Amendment regardless of whether they constituted a matter of public concern.

The Magistrate Judge noted that Dr. San Filippo had also shown that his protected activity was a "substantial factor in the alleged retaliatory conduct," Mt. Healthy, 429 U.S. at 287, since the adverse employment action closely followed the exercise of protected rights. Thus the burden shifted to Rutgers to show that they would have terminated Dr. San Filippo even in the absence of the protected activity. (A2149). The Magistrate Judge concluded that summary judgment on this aspect of the case was not appropriate since Respondent had been denied discovery on whether persons similarly situated who had not engaged in protected activity had been as severely sanctioned. [7]

The parties then filed cross-objections to the Magistrate's Report and Recommendation, Respondent complaining of the failure to grant summary judgment on the procedural due process claim and the Petitioner

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[7] The Magistrate Judge also denied summary judgment on the equal protection claim since the claim of selective enforcement tracked the First Amendment retaliation claim and thus both claims must be weighed under the same legal standard. (A2151-52).

complaining of the failure to grant summary judgment on the First Amendment retaliation/equal protection claim. The District Court, without oral argument and without permitting either party to submit additional papers in support of the Magistrate Judge's rulings with which they agreed, dismissed the entire complaint.

The District Court agreed with the Magistrate Judge that Dr. San Filippo had shown that he had engaged in protected First Amendment activities. Contrary to the Magistrate Judge, however, the Court held that the filing of grievances and law suits were not protected by the petition clause of the First Amendment unless the underlying issue of the proceeding involved a matter of public concern. (App. 77). Nevertheless, the Court concluded that the other complaints Dr. San Filippo made about safety considerations in the chemistry labs, possible illegal activities, financial irregularities and misuse of funds were matters of public concern and thus Respondent had met the first part of the Mt. Healthy test. (App. 83).

The Court also concluded that Dr. San Filippo had shown a "causal connection" between his constitutionally protected activities and the adverse action taken against him. There was a close connection in time between the complaints of financial irregularities and the initiation of charges against him: "At least as to plaintiff's disputes [with his department] in or about 1986, plaintiff has demonstrated sufficient evidence to raise an inference of retaliation." (App. 86) Thus Dr. San Filippo had "met his burden . . . of establishing a prima facie case of retaliation." (Id).

The burden then shifted to the Petitioners to show (not merely to articulate, as in the Title VII context) that they would have dismissed Dr. San Filippo even in the absence of the protected conduct. The court, however, held that there was "no basis in the record upon which to conclude that plaintiff's dismissal on the nine charges was a pretext for his exercise of protected speech." (App. 91). Furthermore, the District Court rejected the Magistrate Judge's conclusion that, pursuant to Rule 56(f), Respondent should have the opportunity to complete his discovery and

to obtain the additional information he had already requested on whether there were other faculty members who were "similarly situated." That is, they had committed acts of comparable seriousness but no charges had been brought against them. This information would tend to show that the "defendants' proffered explanation was indeed pretextual." (A2150).

The District Court held that Dr. San Filippo was entitled to obtain discovery only with respect to faculty members who were "truly 'similarly situated'" with him. (App. 90) But the Court defined such persons as a "tenured faculty member who had 'been known to commit' or was 'accused of committing' offenses of the kind, number, and scope taken together" which were identical to those charged against plaintiff. That is, Dr. San Filippo was entitled to obtain discovery only with respect to a faculty member who was a mirror image of Respondent in that he had committed exactly the same type and number of offenses, but against whom no charges had been brought. "No one suggests that such a person exists." (App. 89-90). On that basis the Court concluded summary judgment should be awarded to Petitioners on the First Amendment retaliation claim.

C. The Decision Sought to Be Reviewed.

An appeal was then taken to the Third Circuit which unanimously reversed the grant of summary judgment by the District Court.

The Court found that summary judgment should not have been granted against Respondent on the First Amendment retaliation claim for three separate reasons:

(1) Respondent had sought discovery on specific issues relating to the First Amendment retaliation claim, including information relating to similarly situated faculty members accused of committing similar offenses against whom no charges were brought; that discovery had not been afforded him; the district court refused to order the additional discovery; the Court of Appeals held that since "the information sought in discovery was of the sort that

might prevent the grant of summary judgment and was under control of Rutgers, we conclude that it was an abuse of discretion to deny San Filippo's Rule 56(f) motion." (App. 19).

(2) even without further discovery, there was sufficient evidence in the record to create genuine issues of material fact that precluded the grant of summary judgment; this included the statements of the Dean instigating the charges who called Respondent "Joe the Warrior," and the statement of one of the dissenting members of the Board of Governors who said that the penalty imposed on Respondent was "quite possibly tainted by a long history of animus," (App 20).

(3) there was record evidence that other faculty members had committed infractions of comparable seriousness yet had not been punished, raising an inference that other considerations may have influenced the University's decision to dismiss Respondent, including possible First Amendment activities; (App 20).

After concluding that summary judgment was inappropriate on these bases, the Court went on to discuss subsidiary issues relevant to the "course of proceedings on remand." (App. 20). There was no doubt that Respondent had engaged in some First Amendment activities, including the expression of speech involving matters of public concern. These included his complaint about illegal activities in the Chemistry Department, safety conditions in the laboratories and improper financial activities by members of his department with respect to federal funds granted to the Respondent or the school. In addition, Respondent had claimed that the jury should be instructed that his lawsuits, grievances and arbitrations also should be considered constitutionally protected activities, as petitions for redress of grievances. This issue was not crucial to the decision below, but was simply another example of the constitutionally protected actions that Respondent was asserting led to retaliation in this case.

The Court held that such lawsuits, grievances and arbitrations were constitutionally protected actions even if the subject matter of the suits was not a matter of public concern. The Court explained:

> ...when government -- federal or state -- formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the mechanism its constitutional imprimatur. (App. 35)

The Court found that the "petition" clause of the First Amendment has a longer history and a different purpose than the speech or press clause. Thus it should not be interpreted exactly as the free speech clause, "a graceful but redundant appendage of the clauses guaranteeing freedom of speech and the press." (App. 37).

The Court of Appeals also held that Respondent had submitted sufficient evidence to create a disputed issue of fact as to whether Respondent's constitutionally protected activities were a "substantial factor" in the decision to dismiss him. This was shown by the statements of the Dean about "Joe the Warrior," the dissenting comments of Governor Wechsler about the "long history of animus," and the evidence of other faculty members committing similar offenses but not being punished. In addition, the Court found that the close proximity in time between some of Respondent's First Amendment activities and the adverse employment action could create an inference of retaliation. "This inference would be particularly strong if the plaintiff can show that the decisionmaker lacked a pretext on which to dismiss the plaintiff until shortly before the time of dismissal." (App. 40).

Finally, the Third Circuit held that the University itself could be found liable for the retaliatory actions noted

in the record. Under Monell v. Department of Social Services, 436 U.S. 658 (1978) and St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988), a governmental body can be held liable only if the actions complained of were the result of an official policy or custom of the body. The Court found that there were sufficient allegations and proof in the record of the University's "deliberate indifference" to the retaliatory actions taken by the administrators in bringing the charges. Here there is no question but that the members of the Board of Governors who passed upon the charges against Respondent and determined to dismiss him were aware of his claims of improper retaliation. The Magistrate Judge had noted that "the record is replete with evidence which indicates that the information regarding San Filippo's protected activities was well known to the individual members of the Board." (App. 43). This was also shown by the dissenting opinion of Walter Wechsler. Substantial material showing the improper motivation was also presented to the Board of Governors by Respondent's attorney. (App. 44). The Court found that "this evidence suffices to create a question whether the ultimate decision-maker acted with deliberate indifference to the plaintiff's First Amendment rights by approving the recommendation that the plaintiff be dismissed." (App. 44).

Adopting this Court analysis in Waters v. Churchill, 62 U.S.L.W. 4397 (1994), the Third Circuit interpreted that decision as requiring employers "to tread with a certain amount of care," when First Amendment rights are implicated, that is, when a public employee is threatened with dismissal after exercising such rights. Thus the policy makers of a governmental body must not be "deliberately indifferent" to charges of retaliation when informed of such accusations.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW RAISES NO SPECIAL OR IMPORTANT ISSUE NOT PREVIOUSLY SETTLED BY THIS COURT.

I. The Third Circuit decision sought to be reviewed is totally consistent with this court's prior decisions and does not present any novel issue requiring review.

The Petition presents a false issue to this Court. Petitioners claim that the decision below presented an allegedly interesting, "important question affecting the public interest," Pet. at 10, namely whether a non-sham lawsuit or formal grievance or arbitration is a "petition for redress of grievances" which cannot be the basis for retaliatory action by government.

However, as noted above, that question is but one of four issues decided by the Third Circuit which required the reversal of the summary judgment motion. The Court voted, unanimously, since Judge Becker joined all other aspects of the decision, (App. 50) that summary judgment should not have been granted by the district court for three separate reasons: (1) proper discovery had not been afforded Respondent, bearing on the University's motivation is dismissing Respondent; (2) even without that discovery, there were material disputes as to the University's reasons for dismissing Respondent since explicit remarks by the University's administrators indicated that his campaign against improper activities in his department (which clearly involved matters of public concern) created an animus against him in the University; (3) Respondent presented evidence that others in the University committed similar offenses but were not disciplined as severely. [2]

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[2] This Court established the basic proposition that discriminatory treatment of similarly situated employees constitutes evidence of improper motivation, even if a fact-finder concludes that the plaintiff did commit dismissible

Those unanimous, non-controversial findings by the Court below are not challenged by Petitioners here and would therefore remain in the case regardless of this Court's action in the future. On the face of the record in this case, the disputed evidence as to the motivation of the University in dismissing Respondent will remain. [9]

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offenses, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)(black employee fired for improper "stall-in" but claimed that the reason was a pretext since other white employees had engaged in similar disruptive conduct but had been retained; employee must be given an opportunity to show that an employer's stated reason was pretextual: "Especially relevant to such a showing would be evidence that while white employees involved in acts of comparable seriousness to the 'stall-in' were nevertheless retained or rehired.") See also Holley v. Seminole County School District, 755 F.2d 1492, 1505 (11th Cir. 1985): "If other teachers had been engaged in similar improper conduct known to the superintendent . . . and those teachers were not disciplined, an obvious inference is raised that Holley was disciplined for reasons other than the improper teacher conduct."

[9] Under well-established law applying this Court's decision in Mt. Healthy City School District Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), a plaintiff must show that he had engaged in protected activities and that such activities were a "motivating factor" in the decision to take the adverse action. This can be shown "indirectly by showing that the protected activity was followed closely by discriminatory treatment" or "through other evidence such as disparate treatment of fellow employees who engaged in similar conduct," or "directly through evidence of retaliatory animus," Taitt v. Chemical Bank, 849 F.2d 775, 777 (2d Cir. 1988) quoting from DeCintio v. Westchester County Med. Center, 821 F.2d 111, 115 (2d Cir. 1987)(emphasis in original). In this case, Respondent has satisfied all three parts of this rule and has provided both indirect and direct evidence of causation. That showing also created a disputed issue of fact as to the whether the employer would have fired the public employee in the absence of the protected

In addition, the determination that the initiation of non-sham litigation is protected by the petition clause of the First Amendment has never been disputed by this Court. In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972), this Court noted: "Rights of access to the courts is indeed but one aspect of the right to petition [for redress of grievances found in the First Amendment,]" and therefore the bringing of litigation by certain trucking companies could not be the basis of an antitrust claim, unless the suit was a mere sham for harassment purposes. See also Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 742-43 (1983)(state court suit brought by employer involving genuine factual issues cannot be enjoined by NLRB: "Considering the First Amendment right of access to the courts . . . [the] filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice.")

The proposition established in the above cases is an obvious one. Regardless of the content of the lawsuit, government must encourage its citizens to use peaceful, dispute resolution procedures to resolve disputes, and there should be no obstacle or threat placed in the way of those who would invoke that channel. It is not the content of the lawsuit, but the mechanism itself that is a matter of public concern.

Numerous lower court cases also place non-sham litigation under the protection of the First Amendment's petition clause, see Brookins v. O'Bannon, 699 F.2d 648, 652 (3d Cir. 1983): "The right to petition the courts, no less than the right to petition the legislative or administrative bodies, is protected by the first amendment"); Goff v. Burton, 7 F.3d 734, 736 (8th Cir. 1993)("Prison officials may not retaliate against an inmate for filing legal actions in the exercise of his constitutional right of access to the courts"); Franco v. Kelly, 854 F.2d 584 (2d Cir. 1988)(if

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conduct, see Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir. 1984): "The plaintiff's evidence might serve both to establish a prima facie case and discredit a defendant's explanation."

prisoner transferred in retaliation for exercise of First Amendment rights, Section 1983 claim will lie); Sprouse v. Babcock, 870 F.2d 450 (8th Cir. 1989) (bringing false disciplinary proceedings against prisoner in retaliation for his bringing lawsuit against prison official is First Amendment violation); Smith v. Maschner, 899 F.2d 940 (10th Cir. 1990) (prisoner stated valid cause of action in asserting that officials retaliated against him for exercising right of access to courts); Wright v. Newsome, 795 F.2d 964 (11th Cir. 1986)(action taken in retaliation for filing lawsuits violates prisoner's First Amendment rights).

The principle is not confined to prisoners. The courts have been clear that whenever any government official takes adverse action against any person because of, or in retaliation for, the exercise of the First Amendment right to have free access to the courts, a constitutional violation occurs. See Serrano's Gasco, Inc v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989): "The right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances. . . . Deliberate retaliation by state actors against an individual's exercise of this right is actionable under section 1983"); Duvall v. Sharp, 905 F.2d 1188, 1189 (8th Cir. 1990)(claim that false charges were filed to coerce plaintiff into dismissing law suit stated a claim under the First Amendment: "This was sufficient for pleading purposes to state a cause of action for retaliatory conduct in violation of Duvall's first and fourteenth amendment rights"); Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422, 1428 (8th Cir. 1986)("state officials may not take retaliatory action against an individual designed to punish him for having exercised his constitutional right to seek judicial relief"); Graham v. NCAA, 804 F.2d 953, 959 (6th Cir. 1986)(claim that student kicked off University football team in retaliation for filing state court action could be violation of constitutional right of access to the courts).

It is true that some lower federal courts have established a different rule when public employee litigation is involved, incorporating the requirements of Connick v. Myers, 461 U.S. 138 (1983) that the underlying litigation

must involve a matter of public concern. See cases cited in App. 31. [10] But those decisions are themselves inconsistent with the broader position established by this Court in California Motor Transport Co., supra, and the other cases cited above. [11]

Nor is the decision below inconsistent with McDonald v. Smith, 472 U.S. 479, 483 (1985). That case simply held that in a suit for defamation, the petition clause

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[10] It must be noted that not all of the cases cited by the Third Circuit (App. 31) nor all of the cases cited by Petitioners (Pet. at 11-12) involve public employee litigation. Thus, for example, the Court below cited White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (2d Cir. 1993) as establishing a "public concern" requirement for lawsuits brought by public employees. But that case involved a towing service which complained by letter and other communications that they were not getting enough business and were being defamed by the police and then claimed that they were terminated as a result of those communications. However, Respondent does not dispute that at least two Circuits have explicitly held that the filing of a lawsuit not involving a matter of public concern cannot be the basis for a constitutional claim. See Ratjen v. Litchfield, 878 F.2d 837 (5th Cir. 1989) and Yatvin v. Madison Metropolitan School Dist., 840 F.2d 412 (7th Cir. 1987).

[11] Petitioners also claim that it is anomalous to treat lawsuits and grievances differently from ordinary speech and testimony in connection with private litigation, which they claim is not protected by the First Amendment. (Pet. at 13-14). However, the premise is incorrect. See e.g., Johnston v. Harris County Flood Control District, 869 F.2d 1565, 1578 (5th Cir. 1989)("When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern...We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state."

does not provide "absolute immunity from damages for libel." It certainly does not stand for the proposition that the petition clause of the First Amendment is identical to the free speech or free press clauses in all respects -- a "graceful but redundant appendage of the clauses guaranteeing freedom of speech and the press," as the Court below said (App. 37). Indeed, the historical record outlined by this Court in McDonald and by the Court below, undermines any such claim.

Thus since the issue on which certiorari is sought would not finally determine the controversy between the parties and since the decision below is not inconsistent with prior decisions of this Court, certiorari should not be granted.

II. The decision below imposing possible liability upon the state university is not inconsistent with this court's decisions in Monell v. Department of Social Services, 436 U.S. 658 (1978) and St. Louis v. Praprotnik, 485 U.S. 112 (1988) or Canton v. Harris, 489 U.S. 378 (1989). In any event, review of the Monell issue is premature, since Respondent presented sufficient evidence to show that the Board of Governors was aware of the retaliatory action complained of and therefore summary judgment was properly denied.

Petitioners do not claim that the Monell issue raised by them (Point II of the Petition) involves a conflict with any decision from another circuit. Indeed, they cannot make any such claim.[12] The fact remains that the decision below is

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[12] There are numerous cases from other circuits holding that municipalities might be held liable on a deliberate indifference standard under circumstances similar to that presented here. In addition to Ware v. Unified School Dist. No. 492, 902 F.2d 815 (10th Cir. 1990), discussed at length in the decision below (App. 41-43), see e.g. Hall v. Marion School Dist. No. 2, 31 F.3d 183, 196 (4th Cir. 1994). The Fourth Circuit there held that a school board might be held liable for the dismissal of a school teacher by a principal, where the board was aware of the

consistent with well-established law on governmental liability. In any event, the exact contours of the Monell issue are not properly presented by the Petition since Respondent was not afforded any discovery on the full extent of the Board of Governors' knowledge of, and responsibility for, the First Amendment violations at issue here, but did present sufficient evidence to require denial of the summary judgment motion.

It is of course a truism that governmental bodies cannot be held responsible for the constitutional violations of lower level officials. Unless the constitutional violation was the result of a policy or custom of the governmental body, liability cannot be imposed.

This Court has also established that if unconstitutional action is taken by lower-level subordinates and the governmental policymakers are unaware of such improper action, those policymakers have no duty to investigate the situation, and the municipality cannot be held liable under such circumstances. As this Court noted in Praprotnik, 485 U.S. at 130, "...the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of discretionary authority, especially where...the wrongfulness of the subordinate's decision arises from a retaliatory motive or unstated rationale."

It is also a truism, as established by this Court in Canton v. Harris, supra, that governmental liability can be established by the "deliberate indifference" of the governmental policymaker toward the constitutional rights of others. Contrary to petitioners' assertions, that "deliberate indifference" standard in this context is more than negligence, but involves at the least, knowledge by the decisionmaker of the actions taken by subordinates alleged

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decision to terminate the teacher, was aware of her First Amendment activity and "refused to intervene" on her behalf.

to be unconstitutional, adoption of the action taken below and a refusal to make any inquiries as to the possible unconstitutional action of which it was aware. See cases cited in fn. 12 above.

The decision of the Third Circuit below is in conformity with this Court's decision in Canton and this Court's holding in Waters v. Churchill, 114 S.Ct. 1878 (1994), which was decided before the Third Circuit's decision in this case. Petitioners denigrate the Third Circuit's adoption of a rule that policymakers "must tread with a certain amount of care" when claims of unconstitutional action are presented to them. But that is precisely the rule that this Court adopted in Waters, 114 S. Ct. at 1889.

This Court noted that policymakers have some obligation to make reasonable inquiries when speech by government employees is alleged to be the basis for dismissal action. This is equally true when there is some dispute over exactly what was said by the employee, as in the Waters case, or, as here, when there is a claim presented to the policymakers that First Amendment protected speech or action was the basis for the decision to take dismissal action against him. In both situations, the policymakers cannot be "deliberately indifferent" to specific First Amendment claims presented to them.

In Waters, this Court held that there was sufficient evidence presented by the plaintiff to require trial by a fact-finder as to the motivation of the policymakers who fired her. "Churchill has produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation," 114 S. Ct. at 1891. Although the employer claimed that the reason for the discharge was because of the allegedly disruptive speech of the employee brought to their attention, this Court said that a fact-finder might conclude that it was "because of nondisruptive statements" that the employee might have made "or because of some other statements she may have made earlier," id. at 1891. It was up to the jury to determine the true motivation, as in any other Mt. Healthy case.

Exactly the same situation is presented here. Petitioners claim that Respondent was dismissed because of the specific acts of misconduct charged against him. Respondent disputes that claim. As the Court below noted, Respondent presented extensive evidence of his protected activities which was "well known to the individual members of the Board." (App. 43). The dissenting opinion of Walter Wechsler shows that the members were also aware that other faculty members "had had students perform uncompensated work for them, yet were not disciplined."(Id. at 44). Furthermore, extensive material was presented by Respondent's lawyer to the Board of Governors about the "personal 'vendetta'" by members of his department (id.) This was more than sufficient to hold the case for trial as to whether the reasons offered were pretextual.

III. The Decision Below was not inconsistent with this Court's decision in Mt. Healthy.

Petitioners' third point in their petition is confusing and unclear. If Petitioners are saying that they cannot be liable for unconstitutional acts by their subordinates unless it can be shown that they participated and shared in that motivation, that issue is already subsumed in the Monell point above.

Petitioners may be claiming that governmental bodies cannot be held liable for retaliatory discharges unless there is concrete evidence of their "purposeful intent" to discriminate -- that an employee must show a "smoking gun" involving explicit anti-expressive sentiments by the policymakers. That claim is foreclosed by this Court's decision in Mt. Healthy and the cases interpreting it.

Mt. Healthy held a plaintiff must demonstrate that he or she engaged in protected activity and that such activity was a substantial motivating factor in the decision to take adverse employment action. The burden then shifts to the employer to show that it would have taken the same action in the absence of the protected conduct. As in any employment discrimination situation, an employer will

always find other justifications for the action. See e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 254-55 (1989) (applying Mt. Healthy standard to Title VII situations and noting that employers always present non-discriminatory reasons for their action).

As in any type of situation involving claims of improper motivation by an employer, there is seldom direct proof of "purposeful intent" to discriminate. As the Tenth Circuit recently stated:

> ...none of plaintiff's allegations amount to a "smoking gun" that prove his firing was related to his incident report [and therefore violated the Mt. Healthy rule]. Still, "allegations of retaliation are often supported only by circumstantial evidence." Durant v. Independent Sch. Dist. No. 16, 990 F.2d 560, 564 (10th Cir. 1993). Plaintiff has put forth sufficient evidence to create a circumstantial case that he was fired in violation of his first amendment rights. Questions concerning whom to believe in this matter are reserved for the jury.

Bisbee v. Bey, 1994 WL 598855 *3 (10th Cir. Nov. 3, 1994).

There are numerous cases to the same effect. See McDonough v. Trustees of University System of N.H., 704 F.2d 780, 784 (1st Cir. 1983)("A . . . hesitation to resolve these cases on a less than fully developed record is evidenced by the reluctance of many Circuit Court of Appeals to approve a grant of summary judgment in Pickering-Mt. Healthy cases"); Peacock v. Duval, 694 F.2d 644, 646 (9th Cir. 1982): " . . . Peacock's First Amendment causes of action necessarily involve complicated questions of motive and intent. A fair resolution of these difficult issues requires a full trial on the merits"; Connor v. Reinhard, 847 F.2d 384, 395 (7th Cir. 1988)(summary judgment inappropriate in Mt. Healthy situation).

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

Dated: New York, N.Y.
December 14, 1994

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